

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 19, 2006

STATE OF TENNESSEE v. CLIFFORD RAY THORNTON

**Direct Appeal from the Circuit Court for Marshall County
No. 16611 Robert Crigler, Judge**

No. M2005-02000-CCA-R3-CD - Filed August 17, 2006

The defendant, Clifford Ray Thornton, pled guilty to burglary, a Class D felony, in exchange for a three-year sentence as a Range I, standard offender, with the manner of service to be determined by the trial court. The trial court denied the defendant's request for alternative sentencing, and he appeals. Following our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, J., and J.S. DANIEL, SR.J., joined.

Hershell D. Koger, Pulaski, Tennessee, for the appellant, Clifford Ray Thornton.

Paul G. Summers, Attorney General and Reporter; Brian Clay Johnson, Assistant Attorney General; W. Michael McCown, District Attorney General; and Melissa Thomas, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

On April 20, 2005, the Marshall County Grand Jury returned a three-count indictment charging the defendant and two codefendants with burglary and two counts of theft under \$500. On July 6, 2005, the defendant entered a best interest guilty plea to burglary, a Class D felony, and the two remaining counts were dismissed. The prosecutor set out the facts surrounding the defendant's conviction at the guilty plea hearing:

The State is prepared to go forward and prove, if called upon to do so, that on the night of January 14th or 15th [2005], maybe in the early morning hours, sometime during the darkness, that the Berlin [S]tore was broken into and that there were a

number of items taken in that particular burglary, including some cigars, possibly some cigarettes; things of that nature.

The Marshall County Sheriff's Department investigated this. They focused their investigation on three people. Those being this defendant, Mr. Clifford Thornton, as well as [the two codefendants]. After they had begun to investigate, they spoke with all three of these individuals and all three of them made statements. The statements were all three inculpatory as to the fact that either they were there present at the location or that their involvement was such that they enjoyed some of the fruits of the burglary.

At the August 24, 2005, sentencing hearing, Beth Ladner of the Board of Probation and Parole testified that she interviewed the defendant and prepared his presentence report. She said the defendant had received alcohol treatment as a juvenile. At the time of the interview, the defendant was working for his brothers-in-law and had maintained sporadic employment since his release from juvenile custody over a year ago. She acknowledged that the defendant did not have an adult record and that all of his prior criminal history occurred at the age of sixteen and mostly involved vandalism and desecration at three cemeteries. She also acknowledged that there were inconsistencies between the defendant's statement and that of his codefendants.

At the conclusion of the hearing, the trial court denied the defendant's request for alternative sentencing and ordered him to serve his three-year sentence in confinement. Thereafter, the defendant filed a timely notice of appeal to this court.

ANALYSIS

_____The defendant's sole issue on appeal is whether the trial court erred in denying alternative sentencing. He argues that "[h]e – and the crime he was convicted of – were not of the type that are a priority for incarceration." The State argues that the record supports the trial court's imposition of a sentence of incarceration. We agree with the State.

When an accused challenges the length and manner of service of a sentence, it is the duty of this court to conduct a *de novo* review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d) (2003). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The presumption does not apply to the legal conclusions reached by the trial court in sentencing the accused or to the determinations made by the trial court which are predicated upon uncontroverted facts. State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994); State v. Bonestel, 871 S.W.2d 163, 166 (Tenn. Crim. App. 1993), overruled on other grounds by State v. Hooper, 29 S.W.3d 1, 9 (Tenn. 2000). However, this court is required to give great weight to the trial court's

determination of controverted facts as the trial court's determination of these facts is predicated upon the witnesses' demeanor and appearance when testifying.

In conducting a *de novo* review of a sentence, this court must consider (a) any evidence received at the trial and/or sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating or enhancement factors, (g) any statements made by the accused in his own behalf, and (h) the accused's potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-103, -210 (2003); State v. Scott, 735 S.W.2d 825, 829 (Tenn. Crim. App. 1987).

The party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Cmts.; Ashby, 823 S.W.2d at 169.

As a standard offender convicted of a Class D felony, the defendant was presumed to be a favorable candidate for alternative sentencing in the absence of evidence to the contrary. Tenn. Code Ann. § 40-35-102(6) (2003). Moreover, because he received a sentence of eight years or less, he was eligible for probation, and the trial court was required to consider probation as a sentencing option. Id. § 40-35-303(a), (b). However, although the defendant was entitled to the presumption of alternative sentencing, he was not automatically entitled to probation as a matter of law. See id. § 40-35-303(b). "The trial court's determination of whether the defendant is entitled to an alternative sentence and whether the defendant is a suitable candidate for full probation are different inquiries with different burdens of proof." State v. Kenneth Jordan, No. M2002-01010-CCA-R3-CD, 2003 WL 21051739, at *3 (Tenn. Crim. App. May 8, 2003) (citing State v. Boggs, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996)). The burden was upon the defendant to show he was a suitable candidate for probation. Tenn. Code Ann. § 40-35-303(b) (2003); State v. Goode, 956 S.W.2d 521, 527 (Tenn. Crim. App. 1997); Boggs, 932 S.W.2d at 477. In order to meet this burden, the defendant "must demonstrate that probation will 'subserve the ends of justice and the best interest of both the public and the defendant.'" State v. Bingham, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995) (quoting State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990)), overruled on other grounds by Hooper, 29 S.W.3d at 9.

There is no bright line rule for determining when a defendant should be granted probation. Bingham, 910 S.W.2d at 456. Every sentencing decision necessarily requires a case-by-case analysis. Id. Factors to be considered include the circumstances surrounding the offense, the defendant's criminal record, the defendant's social history and present condition, the need for deterrence, and the best interest of the defendant and the public. Goode, 956 S.W.2d at 527. Additionally, "[d]enial of probation may be based solely upon the circumstances of the offense when they are of such a nature as to outweigh all other factors favoring probation." Bingham, 910 S.W.2d at 456 (citation omitted).

The presumption in favor of alternative sentencing may be overcome by facts contained in the presentence report, evidence presented by the State, the testimony of the accused or a defense witness, or any other source, provided it is made part of the record. State v. Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996). A trial court may deny alternative sentencing and sentence a defendant to confinement based on any one of the following considerations:

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

Tenn. Code Ann. § 40-35-103(1)(A)-(C).

According to the presentence report, the nineteen-year-old defendant had the following juvenile convictions in 2002 at the age of sixteen: vandalism up to \$500, theft up to \$500, vandalism \$10,000-\$60,000, possession of drugs, and traffic offenses. His record includes a multitude of petitions in the Marshall County Juvenile Court alleging that he vandalized numerous gravestones in various cemeteries, and an order entered by that court on June 12, 2002, reflects the defendant pled guilty to seventy-five counts of trespass or injury to cemetery property, one count of abuse of a corpse, one count of theft under \$500, one count of vandalism under \$500, and one count of vandalism over \$10,000. The presentence report reflects that the defendant was committed to the Department of Children's Services on June 11, 2002, and discharged on June 1, 2004. The report also reflects that the defendant has a ninth grade education but never took the G.E.D. test even though he attended classes while in juvenile custody. Further, the defendant admitted he had used alcohol and marijuana since the age of sixteen and had completed an alcohol abuse program while in juvenile custody.

In denying alternative sentencing, the trial court relied on the defendant's social and employment history, amenability to correction, and prior criminal record. The court explained its ruling:

I think a lot of courts would do a split sentence or give him community corrections. Honestly, after studying this, I don't think he would make it. He has been late to court twice. Considerably late. Two hours late. That indicates to me – we heard excuses last time and maybe they are valid excuses or maybe not. The point is he is not going to be able to meet the requirements of probation or community corrections. I have little doubt if you can't get to court he is not going to make his meetings with

the probation officer and make his other requirements that are part and parcel of alternative sentencing.

I also . . . rely on his prior record as a juvenile, which I understand is pre-argument, but if you look at the presentence report . . . the first entry . . . has an offense date of April 28, 2002.

The next three entries are April 27, 2002.

Then the next entry . . . is April 26.

So I think while it may have been all in the same time span, it wasn't all within a 24-hour period.

I do think that is significant as well as the sheer magnitude of the number of offenses there.

That actually is not his only juvenile offense.

The next entry is drug possession in 2002 also in Marshall County.

The other offenses appear to be traffic offenses.

But there are offenses in Maury County as a juvenile also for truancy, contempt of court These offenses were severe enough that he was committed to the Department of Children's Services as a juvenile.

The Court also places great weight on his employment history which I think is a pretty telling indicator as to whether somebody would be successful on probation or not. We have three jobs. I know there are jobs under comments. We have three basic employers listed. All three were resigned. All three were of short duration.

For that reason, the Court finds that his social history and his amenability to correction[] and his prior criminal record all are such that I should deny the request for alternative sentencing.

Proof at the sentencing hearing established that although the defendant did not have a prior criminal record as an adult, he had an extensive juvenile record which was relevant because he was only nineteen years old at the time of the offense. See State v. Zeolia, 928 S.W.2d 457, 462 (Tenn. Crim. App. 1996). The record amply supports the trial court's determination that the defendant was not amenable to rehabilitation due to his prior criminal record, poor social and employment history, and failure to arrive on time for his court appearances. This court has held that "[a] felon's rehabilitation potential and the risk of repeating criminal conduct are fundamental in determining

whether he or she is suited for alternative sentencing.” State v. Keen, 996 S.W.2d 842, 844 (Tenn. Crim. App. 1999). Accordingly, we conclude that the defendant has failed to carry his burden of establishing that he is entitled to alternative sentencing.

CONCLUSION

Based upon the foregoing authorities and reasoning, we affirm the judgment of the trial court.

ALAN E. GLENN, JUDGE